



January 25, 2008

## HOUSE BILL No. 1209

DIGEST OF HB 1209 (Updated January 22, 2008 2:29 pm - DI 107)

**Citations Affected:** IC 35-36; IC 35-50; noncode.

**Synopsis:** Sentencing. Establishes a procedure to determine whether a defendant charged with murder is an individual with a severe mental illness. Prohibits the imposition of the death penalty on a defendant found to be an individual with a severe mental illness. Provides that a jury will serve as the factfinder in a sentencing hearing in a capital case, even if the defendant pleads guilty or is tried to the court. Permits a defendant to waive the right to impanel a jury during the sentencing hearing. Allows a person: (1) convicted of certain felonies involving controlled substances; and (2) sentenced as a habitual offender; to petition the sentencing court to vacate any additional fixed term of imprisonment added to the person's sentence because the person was found to be a habitual offender. Requires the court to order the department of correction (department) to determine the person's new expected release date if the court vacates an additional fixed term of imprisonment added to the person's sentence. Requires the department to release the person if the department determines that the person's release date occurred before the date the court vacated the person's sentence. Prohibits a person from bringing an action against the state or an employee of the state if the department determines that the person's release date occurred before the date the court vacated the person's sentence.

**Effective:** July 1, 2008.

**Smith V**

January 14, 2008, read first time and referred to Committee on Judiciary.  
January 24, 2008, amended, reported — Do Pass.

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HB 1209—LS 6122/DI 69+



January 25, 2008

Second Regular Session 115th General Assembly (2008)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2007 Regular Session of the General Assembly.

## HOUSE BILL No. 1209

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A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

*Be it enacted by the General Assembly of the State of Indiana:*

1       SECTION 1. IC 35-36-10 IS ADDED TO THE INDIANA CODE  
2       AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE  
3       JULY 1, 2008]:

4       **Chapter 10. Pretrial Determination of Mental Illness in Death**  
5       **Sentence Cases**

6       **Sec. 1. This chapter applies when a defendant is charged with a**  
7       **murder for which the state seeks a death sentence under**  
8       **IC 35-50-2-9.**

9       **Sec. 2. As used in this chapter, "active symptoms" means**  
10       **delusions (fixed, clearly false beliefs), hallucinations (clearly**  
11       **erroneous perceptions of reality), extremely disorganized thinking,**  
12       **or very significant disruption of consciousness, memory, and**  
13       **perception of the environment.**

14       **Sec. 3. As used in this chapter, "formal training in forensic**  
15       **psychiatry or forensic psychology" includes:**

16               **(1) course work or continuing education in a relevant area of**  
17               **forensic psychiatry or forensic psychology; and**

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(2) practice supervised by a qualified forensic mental health practitioner.

Sec. 4. As used in this chapter, "individual with a severe mental illness" means an individual who, at the time of the offense, had active symptoms of a severe mental illness that substantially impaired the individual's capacity to:

- (1) appreciate the nature, consequences, or wrongfulness of the individual's conduct;
- (2) exercise rational judgment in relation to the individual's conduct; or
- (3) conform the individual's conduct to the requirements of the law.

Sec. 5. (a) As used in this chapter, "severe mental illness" means one (1) or more of the following mental disorders or disabilities as diagnosed by psychiatrists or psychologists using their current professional standards:

- (1) Schizophrenia.
- (2) Schizoaffective disorder.
- (3) Bipolar disorder.
- (4) Major depression.
- (5) Delusional disorder.

(b) The term does not include a mental disorder or disability manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs.

Sec. 6. (a) A defendant may file a petition alleging that the defendant is an individual with a severe mental illness.

(b) The petition must be filed not later than twenty (20) days before the omnibus date.

(c) If a defendant files a petition under this section, the court shall order an evaluation of the defendant to provide evidence of whether the defendant is an individual with a severe mental illness. The evaluation must include psychological and forensic testing and shall be conducted by a panel of three (3) disinterested psychiatrists or psychologists endorsed by the state psychology board as health service providers in psychology. Each member of the panel must have formal training in forensic psychiatry or forensic psychology and must have experience in evaluating the mental status of defendants at the time of their alleged offenses. At least one (1) member of the panel must be a psychiatrist. The panel shall be selected as follows:

- (1) The defendant shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.

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(2) The prosecuting attorney shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.

(3) The court shall select one (1) psychologist or psychiatrist from each list submitted by the defendant and the prosecuting attorney.

(4) The two (2) psychologists, two (2) psychiatrists, or the psychologist and psychiatrist selected by the court from the lists submitted by the defendant and the prosecuting attorney shall select a third psychologist or psychiatrist. The third psychiatrist or psychologist is not required to be a psychiatrist or psychologist named on a list submitted by the defendant or the prosecuting attorney.

The court shall ensure that the panel and its members meet the requirements of this subsection.

Sec. 7. (a) The court shall conduct a hearing on a petition filed under this chapter. At the hearing, the court shall consider the evaluation prepared by the psychiatrists or psychologists in accordance with section 6(c) of this chapter.

(b) The court may determine that the defendant is an individual with a severe mental illness only if the defendant proves at the hearing by clear and convincing evidence that the defendant is an individual with a severe mental illness.

Sec. 8. Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is an individual with a severe mental illness based on the evidence presented at the hearing under section 7 of this chapter. The court shall issue written findings supporting the court's determination under this section.

Sec. 9. If the court determines that the defendant is an individual with a severe mental illness under section 8 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9 that seeks a death sentence against the defendant shall be dismissed.

Sec. 10. If a defendant is:

- (1) determined by the court to be an individual with a severe mental illness under this chapter; and
- (2) convicted of murder;

the court shall sentence the defendant under IC 35-50-2-3 but may not impose a sentence of death.

SECTION 2. IC 35-50-2-3, AS AMENDED BY P.L.99-2007, SECTION 212, IS AMENDED TO READ AS FOLLOWS

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[EFFECTIVE JULY 1, 2008]: Sec. 3. (a) A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), a person who was:

(1) at least eighteen (18) years of age at the time the murder was committed may be sentenced to:

(A) death; or

(B) life imprisonment without parole; and

(2) at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole;

under section 9 of this chapter unless a court determines under IC 35-36-9 that the person is an individual with mental retardation. **A court may not impose a sentence of death on a person determined under IC 35-36-10 to be an individual with a severe mental illness (as defined in IC 35-36-10-5).**

SECTION 3. IC 35-50-2-9, AS AMENDED BY P.L.99-2007, SECTION 213, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 9. (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is an individual with mental retardation. **The state may not seek a death sentence against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-10 that the defendant is an individual with a severe mental illness (as defined in IC 35-36-10-5).**

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

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- 1 (E) Kidnapping (IC 35-42-3-2).
- 2 (F) Rape (IC 35-42-4-1).
- 3 (G) Robbery (IC 35-42-5-1).
- 4 (H) Carjacking (IC 35-42-5-2).
- 5 (I) Criminal gang activity (IC 35-45-9-3).
- 6 (J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).
- 7 (2) The defendant committed the murder by the unlawful
- 8 detonation of an explosive with intent to injure person or damage
- 9 property.
- 10 (3) The defendant committed the murder by lying in wait.
- 11 (4) The defendant who committed the murder was hired to kill.
- 12 (5) The defendant committed the murder by hiring another person
- 13 to kill.
- 14 (6) The victim of the murder was a corrections employee,
- 15 probation officer, parole officer, community corrections worker,
- 16 home detention officer, ~~fireman~~, **firefighter**, judge, or law
- 17 enforcement officer, and either:
- 18 (A) the victim was acting in the course of duty; or
- 19 (B) the murder was motivated by an act the victim performed
- 20 while acting in the course of duty.
- 21 (7) The defendant has been convicted of another murder.
- 22 (8) The defendant has committed another murder, at any time,
- 23 regardless of whether the defendant has been convicted of that
- 24 other murder.
- 25 (9) The defendant was:
- 26 (A) under the custody of the department of correction;
- 27 (B) under the custody of a county sheriff;
- 28 (C) on probation after receiving a sentence for the commission
- 29 of a felony; or
- 30 (D) on parole;
- 31 at the time the murder was committed.
- 32 (10) The defendant dismembered the victim.
- 33 (11) The defendant burned, mutilated, or tortured the victim while
- 34 the victim was alive.
- 35 (12) The victim of the murder was less than twelve (12) years of
- 36 age.
- 37 (13) The victim was a victim of any of the following offenses for
- 38 which the defendant was convicted:
- 39 (A) Battery as a Class D felony or as a Class C felony under
- 40 IC 35-42-2-1.
- 41 (B) Kidnapping (IC 35-42-3-2).
- 42 (C) Criminal confinement (IC 35-42-3-3).

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(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, **a jury shall be impaneled for the sentencing hearing unless the defendant waives this right. If the defendant waives the right to have a jury impaneled for the sentencing hearing,** the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any

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other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency. The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt as described in subsection (l) and shall provide a special verdict form for each aggravating circumstance alleged. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) For a defendant sentenced after June 30, 2002, except as provided by IC 35-36-9 **or IC 35-36-10**, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury may recommend:

(1) the death penalty; or

(2) life imprisonment without parole;

only if it makes the findings described in subsection (l). If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. After a court pronounces sentence, a representative of the victim's family and friends may present a statement regarding the impact of the crime on family and friends. The impact statement may be submitted in writing or given orally by the representative. The statement shall be given in the presence of the defendant.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9 **or IC 35-36-10**, the court shall:

(1) sentence the defendant to death; or

(2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (l).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for

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postconviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional postconviction relief. The attorney general shall answer the petition for postconviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

(1) conviction or sentence was in violation of the:

(A) Constitution of the State of Indiana; or

(B) Constitution of the United States;

(2) sentencing court was without jurisdiction to impose a sentence; and

(3) sentence:

(A) exceeds the maximum sentence authorized by law; or

(B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) A person who has been sentenced to death and who has completed state postconviction review proceedings may file a written petition with the supreme court seeking to present new evidence challenging the person's guilt or the appropriateness of the death sentence if the person serves notice on the attorney general. The supreme court shall determine, with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence. If necessary, the supreme court may remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence. The supreme court may not make a determination in the person's favor nor make a decision to remand the case to the trial court for an evidentiary hearing without

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first providing the attorney general with an opportunity to be heard on the matter.

(l) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

**SECTION 4. [EFFECTIVE JULY 1, 2008] IC 35-36-10, as added by this act, and IC 35-50-2-3 and IC 35-50-2-9, both as amended by this act, apply only to crimes committed after June 30, 2008.**

**SECTION 5. [EFFECTIVE JULY 1, 2008] (a) Notwithstanding P.L.291-2001, SECTION 228(b), this SECTION applies to a person if:**

**(1) the person was found to be and sentenced as a habitual offender under IC 35-50-2-8;**

**(2) the felony offense for which the person was sentenced as a habitual offender under IC 35-50-2-8 was:**

**(A) an offense under IC 16-42-19 or IC 35-48-4; and**

**(B) not listed in IC 35-50-2-2(b)(4) (as in effect July 1, 2001); and**

**(3) at the time the person was sentenced as a habitual offender under IC 35-50-2-8, the total number of unrelated convictions that the person had for:**

**(A) dealing in or selling a legend drug under IC 16-42-19-27;**

**(B) dealing in cocaine or a narcotic drug (IC 35-48-4-1);**

**(C) dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);**

**(D) dealing in a schedule IV controlled substance (IC 35-48-4-3); and**

**(E) dealing in a schedule V controlled substance (IC 35-48-4-4);**

**did not exceed one (1).**

**(b) A person described in subsection (a) may petition the sentencing court to have the person's sentence reviewed. Upon receipt of a petition submitted under this subsection, if the court finds that the person who submitted the petition is a person described in subsection (a), the court may vacate any additional fixed term of imprisonment added to the person's sentence under**

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1 IC 35-50-2-8.

2 (c) If, under subsection (b), a court vacates an additional fixed  
3 term of imprisonment added to a person's sentence, the court shall  
4 order the department of correction to determine the person's new  
5 expected release date. If the department determines that the  
6 person's release date occurred before the date the court vacated  
7 the person's sentence under subsection (b), the department shall  
8 release the person.

9 (d) This SECTION does not create a cause of action against the  
10 state or an employee of the state. A person may not bring an action  
11 against the state or an employee of the state if the department of  
12 correction determines under subsection (c) that the person's  
13 release date occurred before the date the court vacated the  
14 person's sentence under subsection (b).

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## COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1209, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Delete the title and insert the following:

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 35-36-10 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]:

**Chapter 10. Pretrial Determination of Mental Illness in Death Sentence Cases**

**Sec. 1. This chapter applies when a defendant is charged with a murder for which the state seeks a death sentence under IC 35-50-2-9.**

**Sec. 2. As used in this chapter, "active symptoms" means delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory, and perception of the environment.**

**Sec. 3. As used in this chapter, "formal training in forensic psychiatry or forensic psychology" includes:**

- (1) course work or continuing education in a relevant area of forensic psychiatry or forensic psychology; and**
- (2) practice supervised by a qualified forensic mental health practitioner.**

**Sec. 4. As used in this chapter, "individual with a severe mental illness" means an individual who, at the time of the offense, had active symptoms of a severe mental illness that substantially impaired the individual's capacity to:**

- (1) appreciate the nature, consequences, or wrongfulness of the individual's conduct;**
- (2) exercise rational judgment in relation to the individual's conduct; or**
- (3) conform the individual's conduct to the requirements of the law.**

**Sec. 5. (a) As used in this chapter, "severe mental illness" means one (1) or more of the following mental disorders or disabilities as diagnosed by psychiatrists or psychologists using their current**

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**professional standards:**

- (1) Schizophrenia.**
- (2) Schizoaffective disorder.**
- (3) Bipolar disorder.**
- (4) Major depression.**
- (5) Delusional disorder.**

**(b) The term does not include a mental disorder or disability manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs.**

**Sec. 6. (a) A defendant may file a petition alleging that the defendant is an individual with a severe mental illness.**

**(b) The petition must be filed not later than twenty (20) days before the omnibus date.**

**(c) If a defendant files a petition under this section, the court shall order an evaluation of the defendant to provide evidence of whether the defendant is an individual with a severe mental illness. The evaluation must include psychological and forensic testing and shall be conducted by a panel of three (3) disinterested psychiatrists or psychologists endorsed by the state psychology board as health service providers in psychology. Each member of the panel must have formal training in forensic psychiatry or forensic psychology and must have experience in evaluating the mental status of defendants at the time of their alleged offenses. At least one (1) member of the panel must be a psychiatrist. The panel shall be selected as follows:**

- (1) The defendant shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.**
- (2) The prosecuting attorney shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.**
- (3) The court shall select one (1) psychologist or psychiatrist from each list submitted by the defendant and the prosecuting attorney.**
- (4) The two (2) psychologists, two (2) psychiatrists, or the psychologist and psychiatrist selected by the court from the lists submitted by the defendant and the prosecuting attorney shall select a third psychologist or psychiatrist. The third psychiatrist or psychologist is not required to be a psychiatrist or psychologist named on a list submitted by the defendant or the prosecuting attorney.**

**The court shall ensure that the panel and its members meet the requirements of this subsection.**

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**Sec. 7. (a) The court shall conduct a hearing on a petition filed under this chapter. At the hearing, the court shall consider the evaluation prepared by the psychiatrists or psychologists in accordance with section 6(c) of this chapter.**

**(b) The court may determine that the defendant is an individual with a severe mental illness only if the defendant proves at the hearing by clear and convincing evidence that the defendant is an individual with a severe mental illness.**

**Sec. 8. Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is an individual with a severe mental illness based on the evidence presented at the hearing under section 7 of this chapter. The court shall issue written findings supporting the court's determination under this section.**

**Sec. 9. If the court determines that the defendant is an individual with a severe mental illness under section 8 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9 that seeks a death sentence against the defendant shall be dismissed.**

**Sec. 10. If a defendant is:**

- (1) determined by the court to be an individual with a severe mental illness under this chapter; and**
- (2) convicted of murder;**

**the court shall sentence the defendant under IC 35-50-2-3 but may not impose a sentence of death.**

**SECTION 2. IC 35-50-2-3, AS AMENDED BY P.L.99-2007, SECTION 212, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 3. (a) A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).**

**(b) Notwithstanding subsection (a), a person who was:**

- (1) at least eighteen (18) years of age at the time the murder was committed may be sentenced to:**
  - (A) death; or**
  - (B) life imprisonment without parole; and**
- (2) at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole;**

**under section 9 of this chapter unless a court determines under IC 35-36-9 that the person is an individual with mental retardation. A**

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**court may not impose a sentence of death on a person determined under IC 35-36-10 to be an individual with a severe mental illness (as defined in IC 35-36-10-5).**

SECTION 3. IC 35-50-2-9, AS AMENDED BY P.L.99-2007, SECTION 213, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 9. (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is an individual with mental retardation. **The state may not seek a death sentence against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-10 that the defendant is an individual with a severe mental illness (as defined in IC 35-36-10-5).**

(b) The aggravating circumstances are as follows:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:
  - (A) Arson (IC 35-43-1-1).
  - (B) Burglary (IC 35-43-2-1).
  - (C) Child molesting (IC 35-42-4-3).
  - (D) Criminal deviate conduct (IC 35-42-4-2).
  - (E) Kidnapping (IC 35-42-3-2).
  - (F) Rape (IC 35-42-4-1).
  - (G) Robbery (IC 35-42-5-1).
  - (H) Carjacking (IC 35-42-5-2).
  - (I) Criminal gang activity (IC 35-45-9-3).
  - (J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).
- (2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.
- (3) The defendant committed the murder by lying in wait.
- (4) The defendant who committed the murder was hired to kill.
- (5) The defendant committed the murder by hiring another person to kill.
- (6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker,

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home detention officer, ~~fireman~~, **firefighter**, judge, or law enforcement officer, and either:

- (A) the victim was acting in the course of duty; or
- (B) the murder was motivated by an act the victim performed while acting in the course of duty.
- (7) The defendant has been convicted of another murder.
- (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.
- (9) The defendant was:
  - (A) under the custody of the department of correction;
  - (B) under the custody of a county sheriff;
  - (C) on probation after receiving a sentence for the commission of a felony; or
  - (D) on parole;
 at the time the murder was committed.
- (10) The defendant dismembered the victim.
- (11) The defendant burned, mutilated, or tortured the victim while the victim was alive.
- (12) The victim of the murder was less than twelve (12) years of age.
- (13) The victim was a victim of any of the following offenses for which the defendant was convicted:
  - (A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.
  - (B) Kidnapping (IC 35-42-3-2).
  - (C) Criminal confinement (IC 35-42-3-3).
  - (D) A sex crime under IC 35-42-4.
- (14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.
- (15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):
  - (A) into an inhabited dwelling; or
  - (B) from a vehicle.
- (16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).
- (c) The mitigating circumstances that may be considered under this section are as follows:
  - (1) The defendant has no significant history of prior criminal

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conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, **a jury shall be impaneled for the sentencing hearing unless the defendant waives this right. If the defendant waives the right to have a jury impaneled for the sentencing hearing,** the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency. The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt as described in subsection (l) and shall provide a special verdict form for each aggravating circumstance alleged. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) For a defendant sentenced after June 30, 2002, except as provided by IC 35-36-9 **or IC 35-36-10**, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury

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may recommend:

- (1) the death penalty; or
- (2) life imprisonment without parole;

only if it makes the findings described in subsection (l). If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. After a court pronounces sentence, a representative of the victim's family and friends may present a statement regarding the impact of the crime on family and friends. The impact statement may be submitted in writing or given orally by the representative. The statement shall be given in the presence of the defendant.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9 or IC 35-36-10, the court shall:

- (1) sentence the defendant to death; or
- (2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (l).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for postconviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional postconviction relief. The attorney general shall answer the petition for postconviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the

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supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

- (1) conviction or sentence was in violation of the:
  - (A) Constitution of the State of Indiana; or
  - (B) Constitution of the United States;
- (2) sentencing court was without jurisdiction to impose a sentence; and
- (3) sentence:
  - (A) exceeds the maximum sentence authorized by law; or
  - (B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) A person who has been sentenced to death and who has completed state postconviction review proceedings may file a written petition with the supreme court seeking to present new evidence challenging the person's guilt or the appropriateness of the death sentence if the person serves notice on the attorney general. The supreme court shall determine, with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence. If necessary, the supreme court may remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence. The supreme court may not make a determination in the person's favor nor make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general with an opportunity to be heard on the matter.

(l) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

- (1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and
- (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

**SECTION 4. [EFFECTIVE JULY 1, 2008] IC 35-36-10, as added by this act, and IC 35-50-2-3 and IC 35-50-2-9, both as amended by this act, apply only to crimes committed after June 30, 2008."**

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Page 2, line 10, delete "shall" and insert "**may**".

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to HB 1209 as introduced.)

LAWSON L, Chair

Committee Vote: yeas 6, nays 1.

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